BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

ANTIGO EDUCATION ASSOCIATION

and

ANTIGO SCHOOL DISTRICT

Case 47
No. 51544
MA-8639

Appearances:

Mr. Thomas J. Coffey, Executive Director, Central Wisconsin UniServ Council-North, appearing on behalf of the Association.

Ruder, Ware & Michler, S.C., by Mr. Ronald J. Rutlin, appearing on behalf of the Employer.

ARBITRATION AWARD

The Employer and Association above are parties to a 1994-95 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve the recall grievance of Donna Wolf.

The undersigned was appointed and held a hearing on December 14, 1994 in Antigo, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. A transcript was made, both parties filed briefs, and the record was closed on February 21, 1995.

Issues:

The Union frames the issue as follows:

1. Did the failure of the Antigo School District to fill the vacancy of the At Risk Instructor with Donna Wolf, who was on layoff, violate the collective bargaining agreement?

2. If so, what is the remedy?

The District's version is as follows:

1. Did the District violate the collective bargaining agreement when it did not recall the grievant to fill the position of Student At Risk Instructor at the beginning of the 1994-95 school year?

Relevant Contractual Provisions:

I. BOARD'S RIGHTS

The Board's right to operate and manage the school system is recognized, including the determination and direction of the teaching force and the right to plan, direct, and control school activities; to schedule classes and assign work loads and subjects to be taught; to maintain the effectiveness of the school system; to determine teacher complements; to create, revise, and eliminate positions; to establish and require observance of reasonable rules and regulations; to select and terminate teachers; and to discipline, discharge, and nonrenew teachers for a just cause.

The foregoing enumeration of the functions of the Board shall not be deemed to exclude other functions of the Board not specifically set forth; the Board retaining all functions not otherwise specifically nullified by this agreement.

. . .

13. Layoff and Recall. If the Board must reduce the teaching staff because of a substantial decrease in pupil population within the School District, loss of operating revenues, elimination of program(s) or any other legitimate reason, the Board shall have the sole right to determine the teaching position or positions to be eliminated. After the Board has determined which position or positions shall be eliminated, the following procedure will be used.

. . .

E. Recall: Full-time teachers laid off under the terms of this Article will be given priority for such vacancies as shall occur in their area of certification during the period of time that they retain seniority under subsection "C" above. Reinstatement shall be made without loss of credit or accrued benefits from prior years of service in the District. Within fourteen (14) calendar days after the teacher receives a notice of re-employment, he/she must advise the District in writing that he/she accepts the position offered by such notice and will be able to commence employment on the date specified therein. Any notice shall be considered received when

sent by registered mail, return receipt requested, to the last known address of the teacher in question and as shown on the District's records. It shall be the responsibility of each teacher on layoff to keep the District advised of his/her current whereabouts. Any and all re-employment rights granted to a teacher on layoff shall terminate upon such teacher's failure to accept within said fourteen (14) calendar days any position for which he/she is certified, offered to him/her by the District.

F. Other Provisions:

. . .

3. No new or substitute appointments shall be made by the District while there are laid-off teachers available who are qualified to fill the vacancies.

. . .

19. Grievance Procedure.

. . .

D. Initiation and Processing.

. . .

(4) Level Four. Arbitration Procedure.

. . .

c. The arbitrator so selected will confer with representatives of the Board and the Executive Committee and hold hearings promptly and will issue his decision on a timely basis. The arbitrator's decision will be in writing and will set forth his finding of fact, reasoning, and conclusions of the issues submitted. The arbitrator will be without power or authority to add to, modify, or delete from the express terms of the Agreement, to make any decisions which require the commission of any act prohibited by law or which is violative of the terms of this Agreement. This decision of the arbitrator will be final and binding on the parties.

Discussion:

The facts are undisputed. Grievant Donna Wolf was employed by the District for three years through the end of the 1993-94 school year as a Business Education teacher. She had accumulated a total of nineteen and one-half years' experience as a teacher when she was laid off at the end of the 1993-94 school year because of low enrollment. 1/

Until 1994-95, the District had handled a gradually increasing number of "at-risk" students by setting up a program through North Central Technical College, in which these students were taught by college personnel at its Antigo facility, and the District paid North Central Technical College for the service. Administrator Wayne Haasl testified without contradiction that by 1993-94, twenty students were in the program, and the program was expected to increase. At Haasl's suggestion, the School Board created a committee to look into the possibility of performing this work using School District personnel. The committee included teachers, students, and Board members, and met through the 1993-94 school year, with the result being a report issued to the Board in May, 1994 recommending a complete change in the way these students were being taught. Following discussion by the Board, the Board determined to bring this work in-house and to create a "school within a school" for teaching these students.

The Board determined to create a position dedicated to teaching at-risk students, and to start to build a program which might be broader in the future. The Board determined to post the position as requiring certification in one of four subjects deemed to be essential for the work at hand: English, Social Studies, Special Education/Learning Disabilities or Mathematics. It is undisputed that in such "alternative" teaching environments, school districts are only permitted by the Department of Public Instruction to use licensed teachers; but that the definition of licensed teacher includes any regular license, even if outside the area of licensing, if the instruction is in collaboration with a "properly" licensed teacher. The Association introduced into evidence without rebuttal a letter from a DPI teacher licensing consultant, specifying that a licensed Business Education teacher would be licensed for the Student At Risk Instructor position at Antigo High School, provided that a teacher licensed at the grade level and in the subject being taught worked in collaboration to perform three functions: Diagnosing the students' education needs, prescribing teaching and learning procedures, and evaluating the effects of the instruction. It is undisputed that the grievant could have performed the work of the position if the District had four other teachers collaborate with her in this manner. It is also undisputed that both of two successive other teachers awarded this position, though "properly" certified in one of the areas involved, had to have such collaborative arrangements in the remaining three related disciplines.

1/ The record demonstrates that the Grievant has taught in an unusually large number of school districts, and that this in no way reflects upon her abilities; instead, it reflects her spouse's career in the military, which has necessitated frequent moves.

Haasl testified without contradiction that when the position was created by the Board he reviewed the records of the teachers then on layoff and concluded that Lynn Leep, who was certified in English, was qualified for the position and had a right to it under the contractual language governing layoff and recall. Leep was offered the position and accepted it. At about that time, the grievant heard of the position, and asked Haasl if the position was going to be posted. Wolf testified without contradiction that Haasl told her that the position would not be posted because it had been filled, and that when she asked him who he had filled it with, he had said that the job was written for an English, Social Studies, Math or Special Ed person, and that Lynn Leep had been awarded the job. The grievant testified that she did not file a grievance at the time because she was under the (apparently mistaken) impression that Leep had greater seniority than the grievant did.

Subsequently, Leep resigned from the position before school began, because she obtained a job closer to her home. It is undisputed that the District did not notify the grievant that the position was once again available. Haasl testified that the reason he did not do so was that the Board had set four potential areas of certification for a teacher to be qualified for this position, and the grievant's certification was not one of the four. Subsequently, the grievant learned of the existence of the position by reading the minutes of the Board's July meeting in the Antigo newspaper, and initiated the grievance.

The job description created for the Student At Risk Instructor lists fourteen job responsibilities. The grievant gave detailed testimony of her work history in connection with each of the fourteen, which was not rebutted. The grievant's testimony can be summarized in this respect as demonstrating extensive experience with learning-disabled and at-risk students, including a significant amount of individual tutoring, a wide variety of specially tailored teaching methods, and service on a DPI committee established to write a handbook on teaching brain-injured students. The grievant gave a significant number of examples of such work, which were unopposed by the District -- as was her testimony that she has never received a negative evaluation at this District or elsewhere. It is undisputed that the teacher hired to serve in the at-risk position, Dennis Duchac, has no such experience, and was to be in his first year of teaching.

The Association contends that the grievant is "qualified", by normally accepted definitions, for the at-risk position. The Association points out extensive testimony to the effect that the grievant has "the natural fitness, ability or endowment" for the particular job, citing Robert's Dictionary of Industrial Relations, and describes the grievant as a tested, successful veteran in dealing with at-risk students, who meets standards far beyond ones of certification. The Association contends that the District provides no evidence for Duchac's qualifications other than the District's claim that it wanted a certified teacher in one of the core areas. The Association contends that the use of the term "qualified" in the recall clause requires that the District show at a minimum, a need to restrict those rights, and that the District has not shown any need to restrict the meaning of the word "qualified". The Association argues that the District's claim that it is

entitled to use higher qualifications or standards than the minimum set by the Department of Public Instruction rings hollow in this case, because the unrebutted testimony on qualifications and experience in working with at-risk students establishes that Donna Wolf is unequivocally better qualified. The Association further notes that the grievant has taught courses for credit in Social Studies, English and Math both in Antigo and other districts, and that she is fully capable of meeting the criteria the District appears to be aiming for.

In the event that the contractual language is found to be ambiguous, the Association contends that the District has failed to show any past practice of interpretation of the layoff clause favoring its position here, and that the arbitral standard that "harsh, absurd, or nonsensical results should be avoided" has considerable relevance in this situation. The Association contends that the grievant unquestionably meets all the job requirements of the general and specific duties, and that it is harsh and absurd to force a well qualified teacher to remain on layoff by framing the certification requirements in such a way that the grievant cannot meet them. The Association requests that the Arbitrator order the District to place the grievant in the at-risk teaching position, with full backpay and interest.

The District contends that Wisconsin Statutes provide that School Boards have the responsibility for managing their School District and exercising general supervision over their schools, and that the "Board's Rights" clause of the agreement here incorporates this managerial authority. The District contends that the right to "create, revise, and eliminate positions" includes the inherent right to determine the required qualifications for the positions. The District notes that the same article provides that the Board retains "all functions not otherwise specifically nullified by this agreement", and contends that no other contractual provision in any way dilutes or qualifies the Board's right to determine the qualifications for teaching positions in the District. The District concedes that a standard does exist under which the Board might be found to have abused these rights, and therefore to have violated the agreement, if it were shown to have acted arbitrarily, capriciously, or in bad faith. But, the District argues, it did not act in such a manner. The District contends that the requirement that the at-risk instructor be certified in English, Math, Social Studies or Special Education was a reasonable one under the circumstances. The District, conceding that the grievant had the proper certification to teach in an at-risk program under the minimum DPI qualifications, argues that a District can require more than the minimum state certification, and that in this instance the Board's determination reflected the task force's in-depth review of the program needs and goals. The District contends that the design of the self-contained "school within a school" program would create a situation in which all instruction would occur in one classroom, and that it was reasonable to conclude that even if all four areas of instruction could not be taught directly by a teacher certified in the particular area, the teacher to be given this assignment should at least be certified in one of the four. The District argues that there is no allegation, and no evidence, that the qualifications were set in a bad faith effort to keep the grievant from obtaining the position, and that Haasl testified that he was not aware of the grievant's background and experience in working with at-risk students. The District contends that it was proper for the first area of inquiry into qualifications to be a review of certifications, and

that since the grievant did not meet that threshold requirement and other candidates did, no inquiry was made into the grievant's

background and experience. The District argues that the instructor qualifications were set in a good faith effort to further the legitimate District objective of creating a school within a school for students in need of at-risk program services, and the District requests that the grievance be denied.

The parties agree, and I find, that there is no functional difference between their versions of the issue before me. The sole contractual language here which might provide grounds for a conclusion that the management rights clause does not govern this case is the language provided in Article XIII(F)(3), which, as the Association notes, provides that the District may not make a new appointment while there is a laid off teacher available who is "qualified" to fill the vacancy. That clause, however, must be read in conjunction with Section E of the same article, which clearly refers to qualifications in terms of area of certification: "full-time teachers laid off under the terms of this Article will be given priority for such vacancies as shall occur in their area of certification . . .". Assuming that the grievant is considered full-time 2/ there is clearly a restriction on the rights granted under the recall clause, which applies those rights only to vacancies occurring in the teacher's area of certification. 3/ Accordingly, I conclude that the term "qualified" in Section F of Article XIII includes the concept "certified" in Section E. The Union cannot, accordingly, prevail under this clause.

If this matter were before me for a disposition on general grounds of equity, there is little doubt that the Union, on this record, would prevail. But to ask the question "which of the two, the newly qualified teacher addressing a classroom for the first time, or the grievant with her substantial and varied experience in addressing the needs of at-risk students, is better qualified in ordinary English usage" is to ask a question which it is beyond an arbitrator's authority to answer under this agreement. Instead, I am authorized to answer only the question of whether a term of the agreement has been violated, and am "without power or authority to add to, modify, or delete from the express terms of the agreement . . ." 4/ The District is correct in arguing that it is widely understood in arbitration that a school board has the right to set qualifications for teachers under management rights language similar to this agreement's, subject to the requirement that it not act in an arbitrary, capricious, discriminatory or bad faith manner. Therefore, the scope of my review of the Board's action must be limited to those four criteria.

The record demonstrates that in designing the position at issue, the Board acted following a lengthy and reasoned planning process, and that the decision to create a "school within a school"

2/ In the District's opening statement a reference was made to the grievant having worked a seven-tenths contract in 1992-93 and 1993-94; the parties did not argue whether or not the grievant was "full-time" within the meaning of the recall clause.

3/ Nothing in the agreement or the parties' evidence or arguments suggests that part-time teachers would be treated more favorably.

4/ Article XIX, subsection D, subsection 4, subsection C.

was a carefully planned one. There is nothing whatsoever in the record to indicate that the District harbored any malign intent toward the grievant at any time in this process or afterwards. The decision to require certification in one of the four core areas of instruction was clearly based in the District's desire to have as much of the instruction as possible handled by an individual "properly" certified for that work. While this clearly exceeded the minimum DPI licensing standard, and excluded the grievant, it was a rational choice of policy and one which, under many circumstances, would be hard to assail.

The fact that the administrator here was unfamiliar with the grievant's extensive experience with at-risk students, and did not inquire further, results in an apparent anomaly in which the individual selected for the job may not have been as capable of performing it as the grievant. But in so doing the administrator was following a procedure which in its own terms reflected a fair and appropriate way of handling the position at issue. Nothing is apparent in this record that would indicate bad faith on the part of the District (which, in fact, initially filled the position with a laid off teacher), and for reasons already noted, there is nothing here to indicate that the decision to require certification in one of the four core areas was arbitrary or capriciously arrived at. In short, the crux of the situation here is that the right to decide an issue inherently must include, within the specified standard of review, the right to make a mistake as seen through another's eyes. Here, the accepted standard of review is one which provides the District a significant level of discretion, and as I have found that the District's action was neither arbitrary, nor capricious, nor discriminatory, nor taken in bad faith, I have no power to overturn it.

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

1. That the District did not violate the agreement by not appointing Donna Wolf to the At Risk Instructor position.

2. That the grievance is denied.

Dated at Madison, Wisconsin this 12th day of May, 1995.

By Christopher Honeyman /s/
Christopher Honeyman, Arbitrator